

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**KUMHO TIRES**

**and**

**Cases 10-CA-208255  
10-CA-208414  
10-RC-206308**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION,  
AFL-CIO-CLC**

*Kami Kimber and Matthew Turner, Esqs., for the General Counsel.  
W. Jonathan Martin II, W. Melvin Haas III and Sul Ah Kim, Esqs. (Constangy, Brooks,  
Smith & Prophete, Macon, Georgia,) for the Respondent.  
Richard P. Rouco, Esq. (Quinn, Conner, Weaver, Davies & Rouco, LLP,  
Birmingham, Alabama,) and Keren Wheeler, Esq., (United Steelworkers of America,  
Pittsburgh, Pennsylvania) for the Charging Party.*

**DECISION**

**STATEMENT OF THE CASE**

**Arthur J. Amchan**, Administrative Law Judge. This case was tried in Warner-Robins, Georgia from March 18-22, 2019. The Board conducted a representation election at the Macon, Georgia facility of Respondent Kumho Tires on October 12 and 13, 2017. In that election 164 votes were cast against the Charging Party/Petitioning Union, the United Steel Workers of America; 136 were cast in favor of representation by the Union. On October 19, 2017 the Union filed the charge in case 10-CA-208255. On October 20, 2017 it filed timely objections to conduct affecting the results of the election. On October 23, 2017, the Union filed the charge in case 10-CA-208414. The General Counsel issued a complaint in the unfair labor practice (CA) cases on July 31, 2018.

On August 28, 2018 the Regional Director issued a report on the objections and consolidated the objections case with the unfair labor practice cases for hearing by an Administrative Law Judge. The General Counsel issued the most recent complaint on March 5, 2019.

The issues in this case involve a host of allegations of unfair labor practices committed by a number of supervisors and managers during the critical period between the filing the Union's representation petition on September 18, 2017 and the representation election on October 12-13, 2017. Some of the allegations of objectionable conduct overlap the unfair labor practice allegations. However, the Union also contends that the election results should be overturned because Kumho Tires allegedly held campaign meetings within 24 hours of the election and because the voter list Kumho provided the Union was incomplete and inaccurate.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, Kumho Tires is a Delaware corporation, with a facility in Macon, Georgia, where it manufactures tires. Kumho annually sells and ships goods valued in excess of \$50,000 directly to points outside of Georgia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the United Steelworkers of America, is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES<sup>1</sup>

#### *Allegations based on uncontroverted facts<sup>2</sup>*

*Alleged violations by company president Hyunho Kim and Human Resources Director, Jerome Miller (complaint paragraphs 30, 39 and 44)*

Landon Bradley testified that a few days before the election company president Hyunho Kim was walking the plant floor with Bradley's team leader, Chris Butler. Kim, through his interpreter, Kim Stone, called employees over to talk to him. Kim spoke in Korean. Through interpreter, Stone, Kim told Bradley that if "this happened," clearly referring to unionization, all employees' jobs were in jeopardy, Tr. 183-84. Kim denies this, Tr. 534. Butler, called by Respondent to testify about violations allegedly committed by him, was not asked about this incident.

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<sup>1</sup> I have organized this decision by discussing each alleged violation according to the alleged agent/supervisor who allegedly committed it. Thus, I recite the General Counsel's evidence in support of the complaint allegations and then the testimony of the agent contradicting that testimony. For example, I grouped together all the alleged violations by team leader Harry "Kip" Smith.

<sup>2</sup> Additionally, there is some testimony other than that pertaining to the alleged violations by Kim and Miller, discussed herein in which Respondent's witnesses did not sufficiently address the testimony of the General Counsel's witnesses. In these instances I also find the testimony of the General Counsel's witnesses is uncontradicted and therefore credible.

Mario Smith testified that shortly before the representation election, Kim was on the plant floor with Jerome Miller, Respondent's human resources director or Chief People Officer. Kim, through his interpreter, asked Smith to talk to him. Kim told Smith, via the interpreter, that the plant would not survive if employees choose to be represented by the Union, Tr. 75-76. Kim told Smith that the company was having a tough time with its creditors and at least suggested that if employees voted against union representation that would be a positive sign to the creditors.

The day before the voting started, Wednesday, October 11, 2017 Smith attended a meeting with about 60-100 other employees on the A shift. Kim read a statement in English. Respondent showed an anti-union video and then Jerome Miller spoke to the employees. Employee Sterling Lewis began recording Miller's remarks shortly after he began speaking, Tr. 77-92; 321-332, G.C. Exhs. 7 and 8. Miller's recorded remarks, as transcribed, were as follows:

Those of you who had decided, I hope the information that I just rambled off will impact you. It is simply said, five percent of production can just quickly go away and be captured by someone else. We appreciate who you are, what you do, but now is the time that you're going to have to, frankly, get off the fence and decide to give this company, which has given you the opportunity to be here, another chance as we go forward.

So I'm asking you to consider not having our work taken abroad, and to get from that little position and cast your vote on tomorrow or Friday, if you're voting on Friday. It's a clear no. There's too much at stake. We're kind of at a crossroads regardless of what position you're in. We can take a path of saying, hey, look, we're looking forward, and we're happy to look forward. We're going to work together. We're going to trust our leader. We're going to trust the new chief (indiscernible)<sup>3</sup> officer. We're going to trust each other with quality and production like never before.

I can't get into some of the things that we plan to do to help make sure that the future is better, but trust me, it's kind of outlined, and we want to be pointed in a direction that makes me feel better about the (indiscernible), and do the work that's needed. We just cannot have this place shut down because we did not decide to get together and work together. That's not where we want to be.

Now, let me speak to those of you who decided already to vote no. We want to thank you in advance for your decision. We want you to feel that you're confirming your decision from this additional data that we're giving you today. We want you to stand by that pre-decision that you made, and feel good about it. Because all of us are simply one big team that's roaming,<sup>4</sup> and we all could be adversely impacted if the business closes down or if the tires are shipped or there's a disruption in the production and you sit idly.

<sup>3</sup> After listening to the recording of Miller's speech I believe this word is most likely "people."

<sup>4</sup> I believe the word is "growing."

Some of you know this, but I need to say it to others of you who don't; the Union can only ask. They can't get, okay? They could ask. If they strike, you can see the (indiscernible)<sup>5</sup> and tires being produced somewhere else. It's that five percent, and that's why we have to put a number around it. It can be produced somewhere else.

The process of collective bargaining, for those of you who've been in it, it takes a long time. It puts me in an awkward position because I want to work closely with you and directly with you, be at the same table with you, but I can't be there if there's a Union. I have to sit across the table, not because I really want to, but the NLRB's laws and regulations requires that, requires me not to come up to you and talk about training and development, or your aspirations, or where you want to go. I have to talk through a person. And you know what happens when you talk through anyone, any outsider? It gets watered down by the time it gets to you. You don't have the same effect and you don't know whether there are three or four other things on their list of priorities.

So again, I'm asking to have direct access to you, to work with you closely, to hear you, to understand where you are. And hopefully, again, you will confirm your position as being a no. Because simply said, again, there's too much at stake.

Now, some of you who voted, planned to vote, voted again, plan to vote no, you may have questions. And hopefully, some of the data that we've shared with you today, you have the answer to. With your supervisor, if there's an appropriate question you could ask him or her, feel free to ask them. But I know, and I can share with you, that they're committed as your leaders, within your respective departments, to take you the distance.

I want to wrap my talk up pretty much, and pretty much tell you that I don't want any of you to look at me and say, hey, Jerome, why didn't you tell me? You know, why didn't you tell me that if we don't get along together, work together, focus together, share our past experiences and frustrations together, what could happen? It's only taken me a couple of weeks to determine that bad things could happen, that worse things could happen. And I want to stand here this morning and have you know pretty much that.

And we'll be looking at tires being shipped somewhere else. So I'm telling you that now, okay? I don't want any of you looking at me later on and saying, hey, why didn't you tell me about the blank<sup>6</sup> situation? Ms. Kimmy (phonetic) said it. I've have reiterated it. We know that they're coming. I want to be real clear this morning so when you leave this room, you'll understand that the decision that you made, hopefully to vote no, is indeed the right decision.

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<sup>5</sup> Most likely "molds."

<sup>6</sup> Most likely "bank."

I really appreciate what all of you are doing and what you will do for this company as we move forward together, better than ever before, stronger than ever before, more united than

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ever before, because we need each other. Now, we're going to pause and show you a few of the videos, and then we'll close the session.

(First video played)

(Second video played)

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As we prepare to wrap up, I'll tell you a very brief story. It's a confidential conversation I had with an employee. He said, you know what? I was part of the Union before and what I learned was, everything's at risk. And I said, what do you mean by that? He said, well, (indiscernible) bargaining process. And I'm all ears. I knew part of this. But he said, everything's at risk. He said, you know what? We I get paid well in our (indiscernible). Very good. We overlook that sometimes.

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And I said, say more to me because I've been here a couple weeks. He said, well, you know, look at her insurance (indiscernible), and he said, you know, you all show this average rate here in the region, as he called it, meaning, like \$11 and some cents. He said, when you go to collective bargaining, man, what I get now, it'll really now become what the average is, because you all won't have to give me what (indiscernible)<sup>7</sup> earning.

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In other words, he said, that's too much risk for me to take (indiscernible), because the company seems to be committed, and our total package, like we use, which is pretty doggone good, as he said. And I agreed with him that that's one key point that all of you who are not aware of that, collective bargaining; we can start from scratch. So whatever you're getting paid now, hourly, could actually go down. That's just the -- that's the way it works. I want you all to think objectively and do your homework, if you haven't already done that; do your research. We try to provide the data that you need to make a good decision, one that will allow you to put no in that box come tomorrow or come Friday.

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Thanks for your attention. Have a great Wednesday.

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Respondent did not call Jerome Miller as a witness and did not indicate that it was unable to do so. The record does not reflect whether or not Miller is still an employee of Kumho. Regardless, Respondent's failure to present evidence that the recording and transcript of Miller's remarks are inaccurate lead me, among other factors, to conclude that they accurately reflect what he told A shift employees on October 11. If the recording was materially inaccurate Respondent also could have called other management witnesses, or unit employees who attended the meeting, to so testify.

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Company President Kim denied that he told Landon Bradley that employees' job were in jeopardy if they selected the Union or that he told Mario Smith that Kumho would not be successful with a union.

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<sup>7</sup> Most likely "currently."

However, he went on to testify that he did tell employees to vote no for the survival of Kumho Tire. He also testified that he told employees that the company was financially losing and, “if we continue and for everyone, they can lose their jobs. If we financially, if it continues, if they going to be difficult. And we can be in serious issue. I did tell them that.” Tr. 534-36. Kim was obviously suggesting that such adverse consequences were more likely if employees selected union representation.

*Allegations for which there is conflicting testimony*

*Alleged Violations by William Monroe (Complaint paragraphs 14 and 15)*

William Monroe, an employee of Road Warrior Productions, arrived at the Macon facility shortly after the Union filed its representation petition. He was hired to lecture employees about the National Labor Relations Act so as to encourage them to vote against union representation.

*(Complaint paragraph 14)*

Michael Cannon, a current Kumho employee, testified that Monroe asked him why Kumho employees needed a union. Cannon testified that he answered that the rules at the plant changed every day and that employees were not given raises they had been promised. Cannon’s uncontradicted testimony is that he had not previously told Monroe that he was in favor of the Union. Monroe testified as follows:

Q. Did you ever have an opportunity to talk to Mr. Cannon during the election?

A. I did.

Q. ...Did you ask him any questions when you were talking to him?

A. Actually, I spent most of my time with Michael answering questions, not asking questions.... So but in any case, I never asked Michael one question. Period. Tr. 430-31.

*Complaint paragraph 15*

Chase Register, also a current Kumho employee, testified that Monroe approached him at his work station and told Register that he heard from team lead Harry “Kip” Smith that Register had questions for him. Register said he did not. According to Register, Monroe then asked him how he felt about the Union; Register then told him the reasons he was pro-Union.

Register also testified the Monroe told him that he was at the plant to fix problems, such as pay and structure. Monroe denied telling Register that he was at the plant to fix problems, Tr. 431-32. Monroe did not address Register’s testimony that he asked Register how he felt about the Union. Since Register’s testimony regarding this interrogation is uncontradicted, I credit it.

Monroe testified that Register was very vocal the mandatory meetings conducted by Respondent during the election campaign and did not try to hide his support for the Union.<sup>8</sup>

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<sup>8</sup> These meetings appear to have started on September 24, 2017, Union Exh. 7.

However, assuming this to be true, I infer Monroe inquired as to Register's sympathies before he was aware of them; otherwise there would have been no reason to ask.

*Alleged violations by Harry "Kip" Smith*

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*Complaint paragraphs 11, 13, 16, 17, 18, 22, 23, 24, 31, 32, 41*

10 Sterling Lewis, a current employee on A shift, testified that before the election, while working overtime, he was walking with Harry "Kip" Smith, a team leader from another shift.<sup>9</sup> Smith asked him how Lewis felt about the Union. Lewis told Smith was neither pro-union or against it, Tr. 319-21. Smith testified that he could not recall this conversation; he did not categorically deny it, Tr. 462.

15 Chase Register testified that "Kip" Smith, his team leader in the APU (Automated Production Unit) on several occasions called him the "ringleader" of the organizing drive. On another occasion, Smith came up to him and asked, "what team he was on," Tr. 29. Smith denied asking Register what team he was on, Tr. 459. Smith testified he knew Register was pro-Union because Register had approached him and asked why everyone thought he was the in-house ringleader of the unionization effort and because of statements made by Register in the  
20 mandatory company meetings concerning the organizing drive.<sup>10</sup>

25 Van McCook, a former Kumho employee, also testified that Smith asked him how he felt about the Union, Tr. 236. McCook testified further that prior to this inquiry, he had never disclosed his union sympathies to Smith, Tr. 237. Smith testified that he did not "interrogate" anybody about their feelings about the Union and does not recall asking McCook about his feelings about the Union, Tr. 456.

30 Marcus Horne, a current Kumho employee, testified that on one occasion during the union campaign, he was having trouble getting the tire beams to stay on the rims. Horne testified that he asked Smith to help him. According to Horne, Smith responded that he'd help but that he would not be able to do so if employees chose to be represented by the Union, Tr. 381. At Tr. 456, Smith appears to indirectly deny that this conversation occurred by testifying that Horne did not work on his shift.<sup>11</sup> However, Smith testified that he told other employees,

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<sup>9</sup> Respondent has admitted that all the team leaders named in the complaint were supervisors and its agents pursuant to Section 2(11) and 2(13) of the Act, during the election campaign.

<sup>10</sup> These meetings began about September 24, Tr. 424, Union Exh. 7, thus leaving open the possibility that Smith inquired about Register's union sympathies between September 18 and 24. In the context of a union organizing drive, the question "what team are you on?" would reasonably be understood as an inquiry as to whether or not one supported the Union. Moreover, given the context of the inquiries by Smith and other supervisors (threats of plant closure, etc.) I would find that these interrogations violated Section 8(a)(1) even if the employee interrogated was an open union supporter, *Fontaine Body and Host Co.*, 302 NLRB 863, 864-65 (1991). When your employer is constantly telling you that unionization will doom his company, an inquiry regarding your union sympathies is not benign, even if the employer already is aware of your union support.

<sup>11</sup> Horne testified that he was working on C shift during the organizing campaign. Chase Register, who was also on C shift, testified that Kip Smith was his team lead. Although this is a small point, I discredit Kip Smith's testimony in this regard and credit Horne's account of his conversation with Smith.

such as Van Cook, Michael Cannon and Chase Register that he “might” not be able to help them if they selected union representation, not that he “could” not help them, Tr. 452-454. I credit the four employees and find that Smith told them that he would not be able to help them if they selected the Union. Smith also asked Horne how he planned to vote, Tr. 383-84.

Van McCook testified that he asked Smith for a day off. Smith replied that he didn’t give sufficient advance notice. Then, according to McCook, Smith said that he was going to let McCook think about it because if Kumho had a Union, Smith would have to apply the rules strictly and he could not let him have the day off, Tr. 238-39. Smith essentially corroborates McCook’s testimony other than denying that he told McCook that he was going to let McCook think about whether McCook wanted a Union before letting him know whether or not Smith would approve the day off, Tr. 455.

McCook also testified that at a preshift meeting attended by 15-20 employees, Smith said that employees should think about whether or not they wanted a union because Kumho could shut the plant down and send its tire molds back to Korea. Smith said at age 50 something he did not want to have to look for another job, Tr. 239-40. Brandyn Lucas testified similarly about what appears to be the same meeting which he said took place at about 7:00 p.m., the night before balloting began the following morning, Tr. 264-65.<sup>12</sup>

Smith essentially confirms McCook’s and Lucas’ testimony. His version is that at a pre-shift meeting with the consultants, he stated:

I just want you guys to make sure you do your due diligence and do all your research before you vote, because your vote is going to impact not just yourself, but it’s going to impact everybody. I said, hypothetically—I said if a union were—to come in and we were to strike. I said Kumho can possibly...in order to meet customer demands, pull the molds out and ship them over to Korea to make the tires to satisfy the customers.

Tr. 457-58, 461.

There is no apparent reason for McCook to fabricate his testimony. He left Kumho voluntarily when the employer who had laid him off rehired him.

Chase Register testified that on one occasion Smith passed by his work station and showed him a photo on his mobile phone. The photo was of a help wanted ad for employees to dismantle rides at a fair. Smith said that if employees voted in the Union, everyone at Kumho may need to be looking for a job, Tr. 33. Michael Cannon, another current Kumho employee, testified that Smith showed him the same photo and said that if the Union was voted in he’d found everybody another job, Tr. 356.

Smith testified that after employees voted he asked consultants Bill Monroe and Rebecca Smith if he could show the photo to employees. Then he went out of the plant floor, showed the photo to several operators and told them that if “disaster struck and the plant closed, I’d found everybody a job,” Tr. 460-61. Neither Register nor Cannon testified to when this incident occurred. However, I find it occurred before the election. There would be no reason for Smith to talk about “if disaster struck,” after the

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<sup>12</sup> Smith did not contradict Lucas’ testimony about meeting with C shift employees the night before the election, within 24 hours of the start of balloting.



balloting.

*Alleged Violations by Michael Geer (complaint paragraphs 27, 35,37,40, 45)*

5 Jason Bailey, a current Kumho employee in Quality Assurance, testified that his supervisor, Michael Geer, told employees in a pre-shift meeting that if the Union won the election, Kumho could lose some of its contracts, Tr. 345-46. Geer testified that he told employees that if there was an interruption in production, customers might switch to other suppliers. He stated this was in response a question about what would happen in the event of a strike, Tr. 466-467.

10 Andre Morman, a former Kumho employee in quality assurance, testified that Geer asked him what he thought of the Union. Morman responded that whether the Union won or not was not a big concern to him. Geer replied that the election was a big deal, that he was not saying Kumho employees didn't need a union, just not the Steelworkers. with whom he had experience in Pittsburgh, Pennsylvania, Tr. 198-99.  
15 Geer denied asking Morman or anyone else how they felt about the Union, Tr. 469. I credit Morman, whose account of this interaction was much more detailed than Geer's. Moreover, the record discloses no reason for Morman to fabricate his testimony. Morman left Kumho for a better paying job.

20 Annie Scott, another former Kumho employee in quality assurance,<sup>13</sup> testified that Geer, her immediate supervisor, approached her one day in her work area. He told her that if employees voted in the Union, it would hurt employees more than the employer, Tr. 281. A few days later, Scott testified that Geer told her that if the Union won the election, Kumho could lose their contracts and ship its equipment back to Korea. He also said that employees could end up with lower pay and lose their insurance. Scott also testified that Geer told her that Cooper Tire Company went out of business because of its union.

25 Scott also testified that when she told Geer that she was pro-union, Geer told her that if she talked to anyone about the Union, it would constitute harassment. He then asked her not to talk to anyone about the Union, Tr. 282. Geer corroborated Scott's testimony in part. He testified that he received a complaint from another employee and thus told Scott that if somebody asks her to stop talking to them, she should stop—otherwise it could be construed as harassment, Tr. 471-72.  
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Brandyn Lucas, a current Kumho employee, testified that an hour after the votes were counted in the representation election, he overheard Geer talking to another supervisor, in the plant break area. About 10 employees were in the area at the time. According to Lucas, Geer said something to the effect that  
35 now that the company had prevailed in the representation election, it had to find out who were the 136 employees who voted for the Union and get rid of them, Tr. 261.

40 Lucas also testified that he reported Geer's remark to safety coordinator Cliff Kleckley. Kleckley suggested that Lucas report the conversation to Respondent's human resources department. Lucas decided not to do so. Geer denied this allegation, Tr. 473. Lucas' testimony about his conversation with Kleckley is uncontradicted.

*Alleged violations by Chris Wilson, Brad Asbell and Eric Banks (Complaint paragraphs 9-12, 33)*

45 Anthony Arnold, a former Kumho employee in the maintenance department, testified to alleged violations by 3 team leaders.<sup>14</sup> He testified that on one occasion, Brad Asbell, his direct supervisor, returned from a supervisors/managers meeting, put his head down on a desk and said if you get the Union in this plant, they will shut it down. Two hours later, production team lead Eric Banks said the same

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<sup>13</sup> Respondent terminated Scott in May 2018.

<sup>14</sup> Arnold left Kumho voluntarily so far as this record shows.

thing to Arnold and fellow employee Mike Nelson. Tr. 128-29. Later in the day, according to Arnold, he and Nelson went to the mixing department. Mixing team lead Chris Wilson also told them that if the Union came to the plant, it would shut down., Tr. 130. A week or two later, Banks told him that if the Union won, employees would lose all their benefits; specifically, health insurance, Tr. 131-32.

Wilson denied telling Arnold that the plant would shut down, Tr. 475, as did Asbell, Tr. 575, and Banks, Tr. 572. Banks also denied telling Arnold that employees would lose benefits if the Union prevailed, Tr. 571-72.

Chauncey Pryor, a current Kumho employee, testified that about a month before the election, employees on his team were called in one by one into the office of their team leader, Eric Banks. Banks' supervisor, Troy Collins, was also present.

Pryor testified that Banks asked him how he felt about the Union, Tr. 159. He then told Pryor that if you were part of a Union, you would be required to sign up for overtime work. Pryor had not indicated whether or not he had supported the Union to Banks or Collins previously. Banks denied asking Pryor about the Union, Tr. 573. He did not testify as to other details of Pryor's testimony, such as whether he called members of his team into his office one by one. Collins, who according to Pryor was present for this discussion, did not testify.

*Alleged violation by Mike Whiddon (complaint paragraph 19)*

Christopher Daniely, a current Kumho employee has worked in the mixing department throughout his employment with Respondent. He testified that at one morning meeting for the entire A shift prior to the election, team leader Michael Whiddon was substituting for his regular supervisor, Michael Walker. Whiddon told employees that if they selected the Union, it's possible there would be a strike and that employees could then lose their jobs, Tr. 272.

Respondent asked Whiddon whether he'd ever told Daniely that if there was a strike, it would possibly have an impact on the company. Whiddon answered, "No sir, not directly," Tr. 481. This, of course, leaves open whether Whiddon indirectly said this in Daniely's presence, as Daniely testified. Whiddon's assertion that he wouldn't have talked to Daniely because didn't report to Whiddon avoids addressing Daniely's testimony that these remarks were made when Whiddon was substituting for Mike Walker at a pre-shift meeting. In essence, Daniely's testimony remains uncontradicted.

*Alleged Violations by Freddie Holmes (complaint paragraph 25)*

Jemel Webb, a former Kumho employee testified about his interaction with mixing department team leader Freddie Holmes.<sup>15</sup> At some point Webb was discussing the Union with Holmes. Webb testified that Holmes asked him what the Union could do for him. Webb testified Holmes asked him the same question on another occasion after returning from a management meeting. On still another occasion prior to the election, Webb testified that Holmes told Webb that Kumho would lose its contracts with Kia and Hyundai because those companies don't do business with unionized suppliers, Tr. 220. On a still different occasion, Webb testified that Holmes told him that Kumho would send the molds back to Korea if employees selected the Union, Tr. 221-222.

Holmes denied asking Webb how he thought he'd benefit from having a Union. To the contrary, Holmes testified that Webb and another employee, Lance Brantley, were discussing the Union and asked Holmes what he thought about it. Holmes testified that in response he told them about being a Teamster

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<sup>15</sup> Webb left Kumho voluntarily.

member while working for UPS and going on strike, Tr. 486. Holmes denied ever telling Webb that Kumho would shut down or send its molds back to Korea or that Kumho would lose its customers if the Union won, Tr. 485-87. Holmes stated that Webb and Brantley asked him if Kia and Hyundai did business with unionized companies. He testified that he told them that he didn't know.

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*Alleged Violations by Stevon Graham (complaint paragraph 20)*

Christopher Harris, a former employee,<sup>16</sup> testified that Stevon Graham, his immediate supervisor, told him and Annie Scott that if employees selected the Union, that they would risk shutting the plant down because Kumho would lose its two biggest contracts, those with Kia and Hyundai, Tr. 145. Harris indicated that Graham made such statements more than once. Harris' testimony in this regard is corroborated by Annie Scott, Tr. 285.

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Landon Bradley, a current employee, testified that Graham discussed the Union with him before the election, attempting to elicit an indication of how Bradley stood on unionization, Tr. 181-182.

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Graham denied ever threatening that the plant would close or that Kumho would lose contracts if the Union won the election. He also said that employees asked him questions, not the other way around, Tr. 493-94. Harris and Scott testified they asked him questions after Graham, on his initiative, joined their conversations about the Union.

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Graham did not directly address Bradley's testimony.

*Alleged violations by Aaron Rutherford (complaint paragraphs 38 and 46)*

Former employee Mario Smith<sup>17</sup> testified that Aaron Rutherford<sup>18</sup> told him that he never talked to him about the Union because Rutherford already heard that Smith was pro-Union, Tr. 73. The General Counsel alleges that this created the impression that Respondent had Smith's union activities under surveillance. Smith also testified that Rutherford said that if employees selected the Union, team leaders would have to go by the book in applying company rules and would not be able to help unit employees in doing their jobs.

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Currently employee Marcus Horne testified that a few days after the election he asked Rutherford why Mario Smith had been terminated.<sup>19</sup> Horne testified that Rutherford told him that Smith was fired for posting certain material on the pro-union employees' website. Horne stated further that Rutherford said Respondent had people watching that website. When Horne asked about other employees who posted on the website, Rutherford told him they'd be taking of as well, Tr. 385-86.

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Rutherford testified that he never told Mario Smith or anyone else that he was keeping an eye on him, or threatened stricter rule enforcement, Tr. 500. Rutherford denies telling Marcus Horne why Smith was terminated. He also said that he never threatened Horne with some sort of punishment for what he put on Facebook. However, this denial does not directly address the Horne's testimony which was about generalized retaliation against pro-union employees for their Facebook posts. It also does not directly contradict Horne's testimony that Rutherford told him Respondent was watching the pro-union website.

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<sup>16</sup> Harris left Kumho voluntarily.

<sup>17</sup> Smith was terminated by Kumho. A charge that his termination violated Section 8(a)(3) and (1) was filed. The General Counsel did not go to complaint on the charge.

<sup>18</sup> Rutherford also no longer works for Kumho.

<sup>19</sup> Smith was terminated on or about October 17, 2017, 4 days after the end of the representation election, Exh. R – 1.

*Alleged Violation by Lorenzo Brown (complaint paragraph 28)*

5 Landon Bradley, a current employee, testified that within 2 weeks of the election, Lorenzo Brown, a team leader in Quality Control, approached him in the auto spray area. Bradley testified that Brown asked him what he thought about Respondent remaining non-union, Tr. 177-78. Bradley had not indicated his view of unionization to Brown previously. Brown denies having any conversations with Bradley other than polite greetings, Tr. 510.

10 Respondent elicited testimony from Brown that he knew what he could and could not say about the Union under the National Labor Relations Act.<sup>20</sup> Brown testified on cross-examination that this was explained to him in a meeting with other team leaders and supervisors. This meeting or meetings did not occur for almost a week after the representation petition was filed. There is no evidence that Brown or any other team lead/supervisor was aware of what statements were prohibited under the NLRB caselaw prior to these meetings. There is also no evidence that these meetings occurred prior to the alleged statements alleged in the complaint to have violated the Act. There is also no evidence as to whether or not team leaders/supervisors were given other instructions/directions that conflicted with their training as to what is permissible under the NLRA.

*Alleged violations by Michael Walker (complaint paragraphs 12 and 42)*

20 Natasha Lee, a current Kumho employee, testified that a couple of weeks prior to the election, Michael Walker, a team leader on A shift, spoke with her twice about the Union. Lee had indicated her support for the Union prior to the first conversation, Tr. 169-170. In the first conversation, Walker suggested that Lee didn't need a union to speak for her because she didn't need anybody to talk to God on her behalf. In the second conversation, Walker told or suggested to Lee that a union victory would adversely affect her, him, other employees and their families.

30 Randy Wilson is a current Kumho employee who drives a forklift at the Macon plant on the D shift. He testified that about a week prior to the election he attended a pre-shift meeting conducted by his team leader, Laquina Adams. Michael Walker, who was on another shift, attended the meeting. About an hour later, Walker approached Wilson on his forklift. According to Wilson, Walker said the plant would shut down with a union and that Wilson should let God take care of everything, Tr. 206.

35 Walker denied making the statements attributed to him by Lee and Wilson, Tr. 521. There are a number of factors that make their testimony more credible than that of Walker. Many of these apply to the testimony of the many other current and former employees who testified in this proceeding and will be discussed further. However, Lee and Wilson's testimony is particularly credible in its consistency with each other. In particular, the detail given by both as to Walker's invocation of God as a reason to vote against the Union rings particularly true.

*Alleged violations by Cliff Kleckley (complaint paragraph 36)*

45 Chase Register and Van McCook testified that Safety Coordinator Cliff Kleckley approached them prior to the election while they were working together in the APU unit. Both testified that Kleckley asked them if he could count on them to vote against the Union. Both indicated they had not indicated which way they were going to vote prior to his conversation, Tr. 32-33; 242-44. Kleckley denies making such an inquiry, Tr. 542.

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<sup>20</sup> Respondent elicited similar testimony from other team lead/supervisors, including Michael Walker.

Respondent denies that Kleckley is its agent under Section 2(13) of the Act. However, as a safety coordinator Kleckley issues employees tickets for safety violations that may result in discipline. Moreover, the record establishes that when Kleckley tells an employee to utilize safety equipment, they do so, thus indicating that when he speaks to employees, they reasonably believe he speaks for Kumho. Thus, the record establishes that Kleckley is Respondent's agent pursuant to Section 2(13), *Community Cash Stores*, 238 NLRB 265 (1978). Moreover, the nature of Kleckley's inquiry, "Can I count on you," would reasonably suggest to employees that he was speaking on behalf of Respondent, not merely himself.<sup>21</sup>

*Alleged Violation by Sharon McColla (Complaint paragraph 43)*

Forklift driver Randy Wilson testified that Production Supervisor Sharon McColla approached him prior to the election and told him that she needed his 100% support, Tr. 207. McColla denied asking any employee for their support in reference to the union election, Tr. 577.

*Alleged Violations by Chris Butler (complaint paragraph 21 and 29)*

Marcus Horne testified that prior to the election, team leader Chris Butler asked him how he was going to vote. Horne told Butler he was not sure. Butler told Horne to be careful because "we could lose the company if we, you know vote for the Union to come in." He pleaded with Horne to give the company more time to get everything right, Tr. 378-79. Butler also told Horne that the company could go to South Korea. Butler denied these allegations, Tr. 579-80.

Landon Bradley testified that prior to the election, Butler approached him in the curing breakroom and asked him if he wanted a "Vote No" hat. Bradley had not indicated to Butler previously whether or not he supported the Union, Tr. 180-81. Butler did not testify about this incident, thus Bradley's testimony is uncontradicted. Butler in asking Bradley if he wanted a "Vote No" hat was in essence interrogating Bradley as to his union sympathies.

*Credibility Resolutions*

Much of this case turns on credibility resolutions. Where demeanor is not determinative, an administrative law judge may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that can be drawn from the record as a whole, *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In no instance of controverted testimony in this case do I find demeanor determinative.

The Board recognizes that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1305 n. 2 (1961).

In this case 18 witnesses testified for the General Counsel. 11 of these were employees of Respondent when they testified: Chase Register, Chauncey Pryor, Natasha Lee, Landon Bradley, Randy Wilson, Brandyn Lucas, Christopher Daniely Sterling Lewis, Jason Bailey, Michael Cannon and Marcus Horne. 7 are former employees of Respondent. Of the 7 the record only shows potential bias or animus towards Respondent on the part of the 2 former employees who were terminated (Mario Smith and Annie

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<sup>21</sup> That Kleckley testified voluntarily for Respondent, without a subpoena, is also an indication that he is an agent of Kumho Tires.

Scott).

15 supervisors/agents testified for Respondent, but not one unit employee.<sup>22</sup> In virtually every case they denied the accuracy/veracity of the General Counsel's witnesses. The denials were often in response to leading questions and without any detail as to any interaction the company witness had with the General Counsel's witness. In general Respondent's witnesses' testimony was limited to a short, sometimes one-word response to a question such as "Did you tell X the plant would shut down?"

Respondent would have me believe that 18 witnesses, including 11 current employees of Kumho fabricated their testimony. This is extremely unlikely. Thus, I credit the testimony of the General Counsel's witnesses with possibly a few exceptions. Where there is reason to be skeptical of this testimony, I will say so. I would also note that much of the General Counsel's testimony regarding statements of Respondent's supervisors and agents is consistent with the messages conveyed to employees by company president Kim and Jerome Miller on October 11, 2017, which is uncontroverted.

*Union Objection 13: Incomplete and Inaccurate voter list*

On or about September 26, 2017 Kumho sent the Union a list of eligible voters. All or virtually all of the addresses were incorrect, as were at least some of the telephone numbers. Respondent had the correct address of some of these employees. This has been established by the fact that some of the witnesses in this proceeding received letters from Respondent at their correct home address during the election campaign.

*Analysis and Conclusions of Law*

*Jerome Miller's speech and other statements by Respondent suggesting that unionization may result in plant closure*

The starting point of any analysis as to whether an employer's statements during a union organizing campaign violates the Act is the U.S. Supreme Court decision is *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-19 (1969). The court noted that Section 8(c) of the Act merely implements the First Amendment by requiring that the expression of any views, argument or opinion shall not be evidence of an unfair labor practice as long as such expression contains no threat of reprisal or force or promise of benefits in violation of Section 8(a)(1). The court went to hold that:

...an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact, to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization....If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

...conveyance of the employer's belief, even though sincere, that unionization will or may result

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<sup>22</sup> With the possible exception of Safety Coordinator Cliff Kleckley, whose ballot was challenged by the Union.

in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof...an employer is free to tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control and not threats of economic reprisal to be taken solely on his own volition.

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The facts regarding one employer covered by the *Gissel* opinion, Sinclair Company, are very similar to statements made by Jerome Miller and other Respondent's agents. Sinclair told employees that it was in precarious financial condition, suggested that the Union was likely to strike causing a plant shutdown and that employees would have a difficult time finding employment elsewhere.

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That some of the statements made by Respondent's agents were couched in terms of what "might" happen, as opposed to what "would" happen makes no difference in finding a violation if the statement otherwise violated Section 8(a)(1), *Daikichi Sushi*, 335 NLRB 622, 623-24 (2001).

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Among that statements that violate Section 8(a)(1) are the following:

The statement by Hyunho Kim to Landon Bradley that if the plant were unionized, employees' jobs were in jeopardy. (complaint paragraph 30).

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The statement by Hyunho Kim to Mario Smith that the plant would not survive if employees choose to be represented by the Union. (complaint paragraph 39).

Many parts of the speech by Jerome Miller (complaint paragraph 44) including the following:

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Five percent of production can just quickly to away be captured by someone else.

We just cannot have this place shut down because we did not decide to get together and work together [clearly suggesting the selecting union representation is a decision not to get together and work together].

. I have to sit across the table, not because I really want to, but the NLRB's laws and

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regulations requires that [this statement suggests Respondent has no intention of bargaining in good faith]

We all could be adversely impacted if the business closes down or if the tires are shipped or there's a disruption in the production and you sit idly by [Miller did not have any basis on which to predict a shutdown of production].

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If they strike, you can see the...and tires being produced somewhere else, it's that five percent, and that's why we have to put a number around it. It can be produced somewhere else. [Miller did not have any objective basis to suggest that unionization would lead to a strike].

Its only taken me a couple of weeks to determine that bad things could happen, that worse things could happen [A statement made without any basis at all].<sup>23</sup>

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And we'll be looking at tires being shipped somewhere else. So I'm telling you that now, okay?

Miller's confidential conversation [real or made up] that an employee told him that unionization put everything at risk.

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<sup>23</sup> This is almost exactly the same statement found to be violative in *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010).

In particular, this last portion of the speech is violative because it conveys that selecting the Union would be an exercise in futility and suggests that Respondent will be punitively intransigent in the event the Union wins the election. There is no evidence that the “we can start from scratch” comment was made in response to any assertions made by the Union in the election campaign and it was divorced from any explanation of the give and take associated with the bargaining process.<sup>24</sup> The “start from scratch” comment in the absence of any indication that Respondent would bargain in good faith with the Union, is violative in of itself, *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 616-18 (2007).

*Other statements that violated the Act in predicting or threatening plant shutdown and/or loss of employment:*

Kip Smith’s comments at a pre-shift meeting about the possibility of a strike followed by the possibility that the tire molds would be sent back to Korea (complaint paragraph 24).

Michael Geer’s comments at a pre-shift meeting that unionization would result in Respondent losing contracts (complaint paragraph 27).

Kip Smith’s statements made in conjunction with showing a picture of workers dismantling carnival equipment to the effect that he had found Kumho employees another job.<sup>25</sup>

Statements predicting plant shutdown and/or loss of benefits by Brad Asbell, Chris Wilson and Eric Banks.

Freddie Holmes’ statements to Jemel Webb that Kumho would lose its contracts with Kia and Hyundai because those companies do not do business with unionized suppliers. (complaint paragraph 25)

Stevon Graham’s comments to Annie Scott and Christopher Harris, which were similar to those made by Holmes, (complaint paragraph 20).

Michael Walker’s statement to Randy Wilson that unionization would result in a plant shutdown (complaint paragraph 42).

Chris Butler’s statements to Marcus Horne. (complaint paragraph 21).

Statement by Michael Whiddon at a pre-shift meeting (complaint paragraph 19).

*Alleged Unlawful Interrogations*

The Board’s standards for evaluating alleged interrogations are set forth in *Rossmore House*, 296 NLRB 1176 (1976) enfd. 760 F. 2d 1006 (9<sup>th</sup> Cir. 1985); and *Kellwood Co.*, 299 NLRB 1026

<sup>24</sup> The fact that the bargaining process may have been described in a non-violative manner by other of Respondent’s agents prior to Miller’s speech on October 11, does not mitigate or detract from the unlawfulness of his comments, *President Riverboat Casinos of Missouri*, 329 NLRB 77, 78 (1999). To effectively negate a prior lawful statement, the employer must specifically disavow it in a timely and unambiguous fashion and assure employees that their rights will be respected in the future. In this case other agents spoke to employees before Miller. His speech was the last word on unionization and collective bargaining given on the eve of the election by one of the highest officials of the company.

<sup>25</sup> I don’t interpret Smith’s statement as a threat of discharge, but rather another statement linking unionization to plant closure.



(1990). Whether interrogation violates the Act depends on several factors: the background of the interrogation, e.g., the hostility of the Respondent towards unionization; the nature of the information sought, i.e., whether the interrogator appears to be seeking a basis to retaliate against the employee; the identity of the questioner, i.e., his or place in the company hierarchy; the place and method of  
 5 interrogation, the truthfulness of the interrogated employee's reply and whether or not the employee questioned was an open and active union supporter. These factors are not to be applied mechanically, *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011).

10 I find that Respondent violated Section 8(a)(1) in each and every interrogation alleged in the compliant. Background: the interrogations occurred during an organizing campaign in which Respondent tried repeatedly to convince employees that unionization would ruin the company and in which it committed a host of other unfair labor practices. As to the nature of the information sought, i.e., support for the Union, it would have been apparent to any employee that expressions of support would not stand in good stead with Respondent. That the interrogations may not have been conducted with an  
 15 eye to discriminating against those indicating support for the Union is irrelevant. The questioning in the context of Respondent's statements as to consequences of unionization was likely to be coercive. The place of the interrogation has no special significance except with regard to the interrogation of Chauncey Pryor, who was one of several employees called into the office of his supervisor, Eric Banks and Banks' supervisor, Troy Collins, to be questioned about his feelings about Union. This made the questioning  
 20 every more coercive than it would have been otherwise.

The questioners in all cases, except Bill Monroe and Cliff Kleckley were individuals with supervisory authority over the employee being questioned. That most were first-line supervisors ameliorates the coercive effect of the questioning minimally in view of the context in which the interrogations occurred.  
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Knowing that Monroe was at the plant to encourage employees to vote No, his inquiries were also coercive. Given the company's open hostility toward unionization, any employee questioned about his attitude towards the Union would be reasonably likely to feel coerced. Indeed, the evasive and/or untruthful answers given to these inquiries by witnesses<sup>26</sup> is a good indication that they were coerced. As  
 30 to the last factor, it has not been established that any of the employees questioned was an open and active union supporter prior to being interrogated. If that was the case, there would have been no need to question them.

35 A supervisor and/or agent has a right to campaign against unionization. However, when he asks or makes a statement seeking a response from a unit employee as to that employee's attitude towards unionization, that is an interrogation.

Applying these standards to the complaint allegations I have the following supervisors or agents violated Section 8(a)(1) when questioning the following employees about their union sympathies:  
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45 Bill Monroe's inquiry to Michael Cannon, complaint paragraph 14.  
 Bill Monroe's inquiry to Chase Register, complaint paragraph 15.  
 Harry "Kip" Smith's inquiry to Sterling Lewis, complaint paragraph 11.  
 Smith's inquiry to Van McCook.  
 Smith's inquiry to Marcus Horne.  
 Michael Geer's inquiry to Andre Morman, complaint paragraph 37.  
 Eric Banks' inquiries to Chauncey Pryor and others, complaint paragraph 33.  
 Freddie Holmes' inquiries to Jemel Webb, complaint paragraph 25.

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<sup>26</sup> Register, Pryor, Lewis, McCook and Morman, for example. Rarely, if ever, did an employee respond to such an inquiry by indicating support for the Union.

Stevon Graham's inquiries to Landon Bradley.

Lorenzo Brown's inquiry to Landon Bradley, complaint paragraph 38.

Cliff Kleckley's inquiries to Chase Register and Van McCook,<sup>27</sup> complaint paragraph 36.

Chris Butler's inquiry to Marcus Horne, complaint paragraph 21.

5 Chris Butler's offer of a "Vote No" hat to Landon Bradley (complaint paragraph 29).<sup>28</sup>

*Respondent by Kip Smith violated Section 8(a)(1) in telling employees that he would no longer be able to assist them in their work and in telling Van McCook that he might not be able to give him a day off without 10 days notice if employees selected the Union.*

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When Kip Smith told employees that in the event of unionization he would no longer be able to assist them in their work he had no basis for saying so. Thus, his statements in this regard violated Section 8(a)(1), *North Star Steel Co.*, 347 NLRB 1364, 1365-66 (2006). The degree to which a supervisor would be able to assist doing unit work under a collective bargaining agreement might well be a subject of negotiation. It is not all certain that the Union would forbid supervisors from doing unit work in all circumstances.

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Similarly, Smith had no basis for telling Van McCook that if employees selected unionization, he would have no flexibility regarding time off requests made less than 10 days in advance.<sup>29</sup> This also might be a subject in collective bargaining negotiations and there is no indication that Smith had any reason to believe the Union would insist on rigid enforcement of such a time-off policy.

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*Respondent, by Michael Geer, violated Section 8(a)(1) in telling Annie Scott not to speak to other employees about the Union.*

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Annie Scott engaged in protected conduct in soliciting the support of other employees for the Union. The fact that an employee may not want to hear a solicitation or repeated solicitations does not negate the solicitation's protected status. This is so even if another employee subjectively considers the solicitation harassment, *Niblock Excavating Company*, 337 NLRB 53, 54, 65 (2001). While there may be circumstances in which the protection of the Act in soliciting employees may be forfeited, Respondent has not come close to establishing that here. Geer's testimony is that an unnamed employee complained that Scott wouldn't stop talking to her about the Union, when asked. First of all, I do not consider Geer a credible witness. Even if I did, his testimony is sparse on the details of the other employee's complaint.

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*The General Counsel has established that Respondent, by Aaron Rutherford violated Section 8(a)(1) in creating the impression that Respondent was engaged in the surveillance of employees' union activities.*

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The Board considers whether under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities have been placed under surveillance, *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). Aaron

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<sup>27</sup> Although Kleckley did not directly supervise Register and McCook, the statement can I count on you, suggests that Kleckley and therefore Respondent might hold it against them if he could "not count on them."

<sup>28</sup> The offer of campaign paraphernalia is in essence an interrogation in that it forces an employee to make an observable acknowledgement of his or her union sentiments, *A.O. Smith*, 315 NLRB 994 (1994).

<sup>29</sup> Statements that an employer will more strictly enforce the rules are indistinguishable from those predicting less flexibility. Both are violative unless based on objective fact. The Board has previously found violative statements indicating that after unionization time off requests would no longer be handled informally, *St. Vincent Hospital*, 244 NLRB 84, 92 (1979).

Rutherford's statement to Marcus Horne that Respondent was watching who posted on a pro-union website, at least created the impression that the company would placing employees' union activities under surveillance in violation of Section 8(a)(1).

5 I reach the opposite conclusion regarding surveillance allegations by Kip Smith and Michael Geer. The General Counsel cites *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010) for the proposition that unless the employer's agent tells the employee the source of his or her information, the employer violates the Act in telling an employee that it know he or she is pro-union. I do not think that is a correct statement of the law. In the instant case, there was an ongoing organizing campaign at the  
10 Kumho plant and there were many ways the employer could determine who was pro-union without spying.

*Respondent, by Michael Geer, violated Section 8(a)(1) by suggesting Respondent would get rid of some or all of the employees who voted for union representation.*

15 I credit the testimony of current employee Brandyn Lucas, that shortly after the ballots were counted in the representation election, Michael Geer said to another supervisor named Craig, within earshot of unit employees that Respondent needed to find out the identity of the 136 employees who voted for the Union and get rid of them. In addition to finding Lucas more credible than Geer, I would note that Lucas  
20 testified that he reported this conversation to Cliff Kleckley. Kleckley, who is an agent of Respondent, did not contradict Lucas. An employer violates Section 8(a)(1) whenever it informs employees that they are targeted for reprisal on account of their union activities, *Trus Joist MacMillian*, 341 NLRB 369, 373 (2004).<sup>30</sup>

25 *Aaron Rutherford violated the Act in telling Mario Smith that Respondent would "go by the book" if employees selected the Union and that employees who posted on the pro-union website would suffer retaliation as well.*

30 A statement that an employer will "go by the book" in the event of unionization is a threat of stricter rule enforcement and violative of Section 8(a)(1), *Hoffman-Taff, Inc.*, 135 NLRB 1319, 1325 (1962).

Rutherford's suggestion that Respondent would retaliate against pro-union employees for their Facebook posts is violative for the same reasons that Geer's comments are violative.

35 Allegations I decline to address because they are cumulative and borderline violations at best:

Complaint paragraph 36: It is not clear to me whether Cliff Kleckley's inquiries to Chase Register and Van McCook, "can I count on you" was designed to illicit a response or was merely encouragement to vote No.

40 Complaint paragraph 43: I am not sure that Sharon McColla's statement to Randy Wilson, "I need your 100% support," is anything more than campaigning against the Union, which supervisors and agents are allowed to do.

45 Michael Walker's conversation with Natasha Lee, complaint paragraph 34.

*Objectionable conduct not alleged as an unfair labor practice*

Several of the Union's objections to conduct which effected the results of the election are not

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<sup>30</sup> This violation occurred after balloting and thus is not "objectionable conduct."

alleged as unfair labor practices:

1. The “Excelsior List” was completely inaccurate.

2. Respondent campaigned against the Union with 24 hours of the start of balloting. Brandyn Lucas’ testimony, that he attended a pre-shift meeting the night before balloting began at which Kip Smith spoke against the Union, is uncontradicted.

3. During the critical period, Team Leader Freddie Holmes created a list of unit employees which appears to make note of whether they favored unionization and why, G.C. Exh. 9. Holmes conceded that he made the list but offered no explanation or any other reason for its creation, Tr. 488. In the absence of such explanation, I find that the document is exactly what it appears to be.<sup>31</sup>

Given the fact that I will recommend a second election on the basis on Respondent’s unfair labor practices, I will only address the objection regarding the Excelsior List. First, the record is a bit sparse in determining whether the pre-shift meeting violated the “*Peerless Plywood*” rule against campaign meetings within 24 hours of balloting.<sup>32</sup> The same is true with regard to the purpose behind Exh. G-9.

However, the “*Excelsior*” rule violation is both clear and blatant. The Board required in *Excelsior Underwear*, 156 NLRB 1236 (1966) that within 7 days of the approval of an election agreement or direction of election, an employer must file with the Regional Director an election eligibility list, containing the names and addresses of all eligible voters. The reason behind the rule is to assure that the Union has access to all eligible voters. Given the fact that Respondent’s list was completely inaccurate and that it did not proffer any explanation for this, I conclude the inaccuracy was deliberate. This would be a reason to overturn the results of the first election even in the absence of unfair labor practices, *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Thrifty Auto Parts*, 295 NLRB 1118 (1989).<sup>33</sup> I recommend that when a second election is conducted that the Region take steps to ensure that the list provided at that time is both complete and accurate.

### *Recommendations Regarding Objections*

Generally, the Board will set an election and order a new election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. The only exception to this policy is where the misconduct is de minimis, such that it is virtually impossible to conclude that the election outcome could be affected. In

<sup>31</sup> All parties had an opportunity to elicit from Holmes what his purpose was in creating this list. In the absence of such testimony, I infer the purpose was not benign, but believe it is unnecessary to render an opinion on its objectionable nature in the context of this case.

<sup>32</sup> *Peerless Plywood*, 107 NLRB 427 (1953). The parties have not briefed the issue as to whether comments made by a supervisor or agent at a regular pre-shift meeting within 24 hours of balloting violates the rule. Moreover, Lucas’ testimony is not as developed on this issue as it could be.

<sup>33</sup> Neither gross negligence nor bad faith is a precondition for invalidating an election due to substantial noncompliance with the *Excelsior* rule. However, such a finding precludes finding substantial compliance with the rule. It is also precludes a finding that the employer’s noncompliance is somehow excused by the Union’s failure to advise the employer of the inaccuracies, *see, Merchants Transfer Co.*, 330 NLRB 1165, fn. 5 (2000). *Sprayking, Inc.*, 226 NLRB 1044 (1976) cited by Respondent is distinguishable for at least 2 reasons; 1) Sprayking substantially complied with the *Excelsior* rule and the bargaining unit in that case was 10 employees, as opposed to about 315 in this case, *see, Laidlaw Waste Systems*, 321 NLRB 760 (1996).

assessing whether the misconduct could have affected the result of the election, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit, the proximity of the misconduct to the election and the closeness of the vote. It also considers the position of the managers who committed the violations, *Bon Appetit Management Co.*, 334 NLRB 1042 (2001); *Caterpillar Logistics*, 362 NLRB No. 49 (2015) enfd. 835 F. 3d 536 (6<sup>th</sup> Cir. 2016).<sup>34</sup>

Respondent's statements, some of which were made by high-ranking company officials in captive audience meetings had more than a minimal impact on employees. The violative statements were numerous, severe (i.e., threats of plant closure) disseminated widely and were made up to the evening prior to balloting. Moreover, Respondent's deliberate failure to provide an accurate election eligibility list warrants setting aside the October 2017 election. Therefore, I recommend that the election be set aside and remanded to the Regional Director for the purpose of conducting a second election.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Although recognizing that a notice reading is an extraordinary remedy, this case is on all fours with the Board's recent decision in *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (April 4, 2019). Respondent by numerous supervisors and agents, including its president and "chief people officer" committed numerous violations. Such pervasive unlawful conduct warrants a broad cease-and-desist order and a notice reading.

Therefore, Respondent's president, Hyunho Kim, or Chief People Officer Jerome Miller (or a management official of at least equal rank if Kim and/or Miller no longer work for Respondent), in the presence of President Kim (if read by Miller) and a Board Agent, and an agent of the Union if the Region or the Union so desires, shall read the notice aloud to unit employees at meetings to which all employees are required to attend, or at Respondent's option, in the presence of Kim and Miller, permit a Board agent to read the notice aloud to unit employees at meetings to which all employees are required to attend.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>35</sup>

<sup>34</sup> The Court of Appeals noted that the direction of a second election was unreviewable.

<sup>35</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, Kumho Tires, Macon, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) threatening employees with plant shutdown, job loss, loss of benefits, transfer of work to other locations and stricter rule enforcement if they select union representation.
- (b) Threatening employees with reprisals, specified and unspecified, for their support of a union.
- (c) Suggesting that it will respond to employee grievances and complaints if employees reject union representation.
- (d) interrogating employees regarding their union sympathies.
- (e) suggesting that selecting union representation would be futile.
- (f) threatening changed work conditions, such as less help from supervisors.
- (g) giving the impression that it has placed employees' union activities under surveillance.
- (h) telling employees not to speak to other employees in support of the Union.
- (i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days after service by the Region, post at its Macon, Georgia facility copies of the attached notice marked "Appendix."<sup>36</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any

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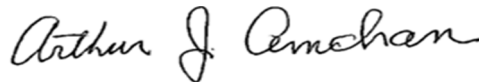
<sup>36</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 18, 2017.

10 (b) Within 14 days of service by the Region conduct meetings to which all unit employees are required to attend, during work time, at which Respondent's president, Hyunho Kim, or Chief People Officer Jerome Miller (or a management official of at least equal rank if Kim and/or Miller no longer work for Respondent), in the presence of President Kim (if read by Miller), and a Board Agent, and an agent of the Union if the Region or the Union so desires, and read the attached notice marked "Appendix" aloud or at Respondent's option, in the presence of Kim and Miller, permit a Board agent to read the notice aloud to unit employees at meetings to which all employees are required to attend.

15 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

20 Dated, Washington, D.C. May 14, 2019

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Arthur J. Amchan  
Administrative Law Judge

## **APPENDIX**

### **NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** threaten you with a plant shutdown if you select union representation by the United Steelworkers Union or any other union.

**WE WILL NOT** threaten to transfer work out this facility if you select union representation by the United Steelworkers Union or any other union

**WE WILL NOT** threaten you with job loss if you select union representation.

**WE WILL NOT** threaten reprisals against employees who support or supported the Union.

**WE WILL NOT** threaten you with a loss of benefits in you select union representation.

**WE WILL NOT** threaten you will stricter rule enforcement if you select union representation.

**WE WILL NOT** place your union or other protected activities under surveillance and will not create the impression that we are doing so.

**WE WILL NOT** threaten you with changed working conditions, such as that supervisors will not be able to render any assistance to you if you select union representation.

**WE WILL NOT** solicit grievances with the implication that we will rectify them if employees reject unionization.

**WE WILL NOT** ask you about whether or not you support the United Steelworkers Union or any other union.



**WE WILL NOT** tell you to stop soliciting other employees in support of the United Steelworkers or any other union.

**WE WILL NOT** make statements indicating that it would be futile for you to select union representation.

**WE WILL NOT** in any other manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

**WE WILL**, if you select union representation by the United Steelworkers or any other union, on request, bargain with the Union in good faith and if agreement is reached on a collective bargaining agreement, **WE WILL** sign the agreement and abide by its terms.

**KUMHO TIRES**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531  
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/10-CA-208255](http://www.nlr.gov/case/10-CA-208255) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (470) 343-7498.